The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

IN RE WASHINGTON MUTUAL, INC. SECURITIES, DERIVATIVE & ERISA LITIGATION	No. 2:08-md-1919 MJP
IN RE WASHINGTON MUTUAL, INC. SECURITIES LITIGATION This Document Relates to: *Solton v. Killinger*, No. C09-664-MJP; and *City of San Buenaventura v. Killinger*, No. C09-816-MJP.	Lead Case No. C08-0387 MJP **OPPOSITION TO PLAINTIFFS' MOTION TO REMAND** ***Note for Motion: October 2, 2009*** **ORAL ARGUMENT REQUESTED**

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TABLE OF CONTENTS

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TABLE OF AUTHORITIES

Page(s)

Cases

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Statutes

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I. PRELIMINARY STATEMENT

Solton and *Ventura* are two of the dozens of lawsuits now pending in this Court against the former officers, directors and auditor of Washington Mutual, Inc. ("WaMu"). As in the other WaMu cases over which this Court is presiding, the plaintiffs in *Solton* and *Ventura* allege that they were "deceived" into investing in WaMu by false and misleading statements, and they seek recoupment of their claimed investment losses. Nothing about *Solton* and *Ventura* is different in kind from the other cases sent to this Court for coordinated case management and disposition: they name the same defendants present in other cases; they seek recovery on the same basic premise ("fraud"); and they make essentially the same factual allegations made by other plaintiffs before the Court—which is why the United States Judicial Panel on Multidistrict Litigation (the "JPML") ordered *Solton* and *Ventura* transferred to this Court.

Plaintiffs ask this Court to remand *Solton* and *Ventura* to state court in California. Aside from a wholly meritless argument that this Court lacks jurisdiction under the exceptionally broad "related to" jurisdictional grant of the Judicial Code, *see* 28 U.S.C. § 1334(b) (vesting federal district courts with "original but not exclusive jurisdiction of all civil proceedings . . . related to cases under title 11," *i.e.*, bankruptcies), Plaintiffs' motion is addressed entirely to this Court's discretion. Yet Plaintiffs offer no persuasive reason for exercising that discretion in favor of wasteful, duplicative proceedings in another forum, rather than the orderly, efficient proceedings envisioned by the JPML and effectuated by this Court's case management orders. In particular, Plaintiffs make no claim that their two cases are different in kind from the nearly two dozen other cases centralized before this Court, or that they would in any way be prejudiced by having their claims heard as part of the comprehensive MDL docket.

The issues raised by the pending motion to remand are essentially identical to the remand motions filed in the *Lehman Brothers* litigation. Lehman, like WaMu, is in bankruptcy. And the collapse of Lehman, like the FDIC's seizure of WaMu, led to a cascade of civil cases that were ultimately centralized by the JPML before a single federal court. (The *Lehman Brothers* cases are pending in the Southern District of New York before the Hon. Lewis A. Kaplan.) In *Lehman*

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Brothers, the same California municipalities who are plaintiffs in *Solton* and *Ventura*—represented by the same counsel—sought to proceed ahead of every other case in a different forum (California state court), on the basis of the same arguments made in the pending motion to remand. In denying Plaintiffs' remand motion, Judge Kaplan rejected all of Plaintiffs' arguments, reasoning that federal jurisdiction indisputably exists and that a discretionary remand would amount to "hav[ing] the tail wag the dog." Caplow Decl. Ex. A (Pretrial Order No. 8, *In re Lehman Bros. Securities & ERISA Litigation*). There is no reason for a different result here.

II. BACKGROUND

On February 21, 2008, the United States Judicial Panel on Multidistrict Litigation (the "JPML" or "Panel") ruled that all Washington Mutual-related litigation "arising from alleged misrepresentations or omissions concerning WaMu's financial condition with respect to its subprime home loan portfolio" should be centralized before this Court. *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 536 F. Supp. 2d 1377, 1378 (J.P.M.L. 2008). The Panel ruled that centralization was necessary and appropriate in order to "eliminate duplicative discovery; prevent inconsistent pretrial rulings, especially with respect to class certification; and conserve the resources of the parties, their counsel and the judiciary." *Id.* (citing 28 U.S.C. § 1407).

As it had done with prior "tag along" actions, the JPML recently transferred two new cases to this Court: *Solton v. Killinger*, Case No. C09-664-MJP ("*Solton*"), and *City of San Buenaventura v. Killinger*, Case No. C09-816-MJP ("*Ventura*"). *Solton* and *Ventura* were originally filed in California Superior Court in San Francisco on March 6, 2009 and April 17, 2009, respectively. Each case was promptly removed to the U.S. District Court for the Northern District of California less than 30 days after original commencement—well within the time limit specified in the Judicial Code, *see* 28 U.S.C. § 1446(b), and prior to any action or expenditure of judicial resources by the state court. *See* Notices of Removal [Dkt. #2-2 in *Solton* and Dkt. #2-10 in *Ventura*]. Thereafter, upon being notified of the existence of the actions, the JPML reviewed the pleadings and found that both cases "involve[] questions of fact that are common to

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the actions preciously transferred to the Western District of Washington and assigned to Judge Pechman." Conditional Transfer Orders [Dkt. #1 in *Solton* and *Ventura*].

The allegations set out in each of the *Solton* and *Ventura* complaints are identical to each other, and essentially track the same basic claims advanced in the 22 other Washington Mutual-related cases centralized before this Court under the MDL docket number. Specifically, the *Solton* and *Ventura* plaintiffs allege that they invested in Washington Mutual in reliance on the Company's risk management, underwriting, appraisal and accounting practices, and were deceived because "WaMu senior management had secretly decided to dramatically increase the level of risk assumed by the Company without informing investors and abandoned recognized underwriting standards [such that] WaMu's allowances were under-reported by hundreds of millions of dollars." *Solton* & *Ventura* Compls. ¶¶ 1–3. The *Solton* and *Ventura* plaintiffs could not name WaMu itself as a defendant because WaMu is protected by the Bankruptcy Code's automatic stay. *See* 11 U.S.C. § 362. However, every party that has been named as a defendant in either case is alleged to be liable on account of actions taken for or on behalf of WaMu. *Solton* & *Ventura* Compls. ¶¶ 12–25.

III. ARGUMENT

A. This Court Indisputably Has Jurisdiction Over Plaintiffs' Claims

Plaintiffs' first argument—lack of "subject matter jurisdiction"—is without merit. The Judicial Code vests this Court with subject matter jurisdiction over any lawsuit "related to" WaMu's bankruptcy proceedings. 28 U.S.C. § 1334(b). Such "related to" jurisdiction exists so long as the outcome of the suit "could conceivably have ***any*** effect on the estate being administered in bankruptcy." *In re Feitz*, 852 F.2d 455, 457 (9th Cir. 1988) (quoting *Pacor, Inc. v. Higgins*, 743 F.2d 984, 994 (3d Cir. 1984)) (emphasis added). Indeed, the Supreme Court has clarified that an action is "related to" a bankruptcy proceeding even if the debtor is neither named as a party nor claims any interest in the property in dispute. *Celotex Corp. v. Edwards*, 514 U.S. 300 (1995).

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1. Individual Defendants

Plaintiffs' claims against the individual defendants in *Solton* and *Ventura* are unquestionably "related to" the WaMu bankruptcy. These former officers and directors of WaMu are contractually entitled to indemnification for any judgment or settlement, as well as advancement/reimbursement of defense costs. *See* Caplow Decl. Ex. B (bylaws of Washington Mutual, Inc.) Art. VIII (contractually obligating WaMu to indemnify its officers and directors "against all expense, liability and loss . . . in any actual or threatened action, suit or proceeding, whether civil, criminal, administrative or investigative"); *see also* Caplow Decl. Ex. C (Indemnification Agreement) (contractually obligating WaMu to indemnify recipient "against all expenses, liabilities and losses" incurred in "any actual, pending, or threatened action, suit or proceeding") (identical agreements exist for other defendants). Well-settled case law from within the Ninth Circuit and around the country holds that the individual officers' and directors' contractual right to indemnification by WaMu suffices to confer "related to" jurisdiction. *E.g.*, *Carpenters Pension Trust v. Ebbers*, 299 B.R. 610, 613 (C.D. Cal. 2003); *In re Sizzler Restaurants International, Inc.*, 262 B.R. 811, 818–19 (Bankr. C.D. Cal. 2001); *Senorx, Inc. v. Coudert Bros.*, 2007 WL 1520966, at *2 (N.D. Cal. 2007); *In re El Paso Refinery, LP*, 302 F.3d 343, 349 (5th Cir. 2002); *In re Dow Corning Corp.*, 86 F.3d 482, 494 (6th Cir. 1996); *A.H. Robins Co. Inc. v. Piccinin*, 788 F.2d 994, 1007 (4th Cir. 1986); *City of Ann Arbor Retirement System v. Citigroup Mortgage Loan Trust*, 572 F. Supp. 2d 314, 317 (E.D.N.Y. 2008); *Abbatiello v. Monsanto Co.*, 2007 WL 747804, at *2 (S.D.N.Y. 2007); *In re Enron Corp. Securities, Derivative & ERISA Litigation*, 2002 WL 32107216, at *6–*7 (S.D Tex. 2002).

In response to this extensive body of case law, Plaintiffs claim that "there is no right to indemnification for fraud and bad faith alleged in Plaintiffs' [complaints]" because public policy prohibits such indemnification. Opening Br. at 6. But this argument confuses mere *allegations* of fraud (which Plaintiffs claim to have pled in their complaints) with *proof* of fraud (required to defeat a corporate official's contractual right to indemnification). *See* Caplow Decl. Ex. B (bylaws of Washington Mutual, Inc.) § 8.1 (eliminating indemnification rights only for

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individuals who have been "finally adjudged" to have committed "intentional misconduct"). Plaintiffs do not—because they cannot—claim that any defendant in either *Solton* or *Ventura* has been "finally adjudged" liable to anyone for anything, let alone "intentional misconduct." These officers and directors are therefore fully entitled to indemnification. "Related to" jurisdiction therefore exists now and existed at the time both *Solton* and *Ventura* were removed. *See Spencer v. U.S. District Court*, 393 F.3d 867, 871 (9th Cir. 2004) ("Challenges to removal jurisdiction require an inquiry into the circumstances *at the time the notice of removal is filed*.") (emphasis added); *Carpenters Pension Trust*, 299 B.R. at 613 (denying motion to remand where plaintiffs made the same argument concerning future limitations on indemnification: "The fact that WorldCom may have some legal defenses against claims for indemnification does not alter that such claims could conceivably have some effect on WorldCom's bankruptcy.").

Nor is there any merit in Plaintiffs' claim that indemnification rights are somehow contingent or not yet accrued. Opening Br. at 7–8 (relying on *In re Federal-Mogul Global Inc.*, 300 F.3d 368 (3d Cir. 2002)). To the contrary, the bankruptcy court has entered an order permitting advancement of defense costs from the Company's D&O insurance policies:

> Pursuant to sections 105(a) and 362(d) of the Bankruptcy Code, the automatic stay, to the extent applicable, is hereby modified to, and without further order of this Court, allow the Individual Defendants to recover, in connection with the Lawsuits, payment of covered defense costs, advancement of covered defense costs, or both from the Debtors' third party insurance companies, and authorize the Debtors' third party insurance companies to pay covered defense costs, advance covered defense costs, or both.

Caplow Decl. Ex. D (order entered December 16, 2008, by the Hon. Mary F. Walrath, U.S. Bankruptcy Judge) ¶¶ 2 & 7. The order from the Bankruptcy Court further confirms that this case has a "conceivable effect" on the WaMu estate. *See, e.g.*, *Dow Corning*, 86 F.3d at 494–95 (potential impact on the debtor's insurance policies supplies "related to" jurisdiction); *A.H. Robins*, 788 F.2d at 1007 (same, where defendants were additional insureds under the debtor's insurance policy); *Kennilworth Partners II LP v. Crisman*, 2001 WL 30534, at *3 (N.D. Cal. 2001) (same). The cases Plaintiffs cite, by contrast, do not support their argument. In *Williams*

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v. Shell Oil Co., 169 B.R. 684, 690 (S.D. Cal. 1994)), the court found that "related to" jurisdiction did in fact exist on grounds that the debtor, though not named in the proceeding, had entered into a pre-petition indemnification agreement with the defendants. And *ACI-HDT Supply Co. v. Kuhlman*, 205 B.R. 231, 237–38 (B.A.P. 9th Cir. 1997) did not address any indemnification agreements at all.

2. Deloitte

Plaintiffs' sole remaining argument concerns the claims against Deloitte, which (by Plaintiffs' telling) does not have contractual indemnification rights vis-à-vis the WaMu bankruptcy estate. But Deloitte has potential claims for contribution and indemnity that could reduce the WaMu estate if Plaintiffs recover against Deloitte. *See, e.g.*, *Baird v. Jones*, 27 Cal. Rptr. 2d 232, 235 (Cal. App. 4th Dist. 1993) (comparative equitable indemnity as between multiple tortfeasors to apportion loss in relation to relative culpability); Cal. Civ. Proc. Code § 875. Courts have routinely found "related to" jurisdiction in such circumstances. *See, e.g.*, *Carpenters Pension Trust*, 299 B.R. at 613 ("related to" jurisdiction existed as to all defendants, including the auditor of debtor, based in part on "contributory rights"); *In re First Alliance Mortgage Co.*, 269 B.R. 449, 454 (C.D. Cal. 2001); *Pacific Life Insurance Co. v. J.P. Morgan Chase & Co.*, 2003 WL 22025158, at *1 (C.D. Cal. 2003); *In re Sizzler*, 262 B.R. at 818–19. Indeed, in the *Lehman Brothers* litigation, Judge Kaplan rejected the very same arguments – made by the very same plaintiffs' counsel – seeking remand of their claims against Lehman's auditor, Ernst & Young. Judge Kaplan found that Ernst & Young had "potential claims against the Lehman estate for contribution," and therefore, "the outcome of any or all of these claims would have a 'conceivable effect' on the Lehman bankruptcy." Caplow Decl. Ex. A (Pretrial Order No. 8, *In re Lehman Bros. Securities & ERISA Litigation*).

Aside from the question of "related to" jurisdiction under Section 1334, this Court has supplemental jurisdiction over Plaintiffs' claims against Deloitte under Section 1367 of the Judicial Code. *Security Farms v. International Board of Teamsters*, 124 F.3d 999, 1008 n.5 (9th Cir. 1997) (district court had supplemental jurisdiction over state claims asserted against third

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party defendants on the basis of court's "related to" jurisdiction over claims against debtor defendant); *In re Pegasus Gold Corp.*, 394 F.3d 1189, 1194–95 (9th Cir. 2005) (same). The claims against Deloitte and the individual defendants derive from a "common nucleus of operative facts" (Plaintiffs' claimed investment losses) and "would ordinarily be expected to be resolved in one judicial proceeding." *Id.* Indeed, the fact that Plaintiffs brought their claims against Deloitte in the same lawsuits (*Solton* and *Ventura*) as their claims against the individual defendants evidences Plaintiffs' recognition of this simple truth.

Moreover, keeping all of these claims together promotes the goals of efficiency, convenience, and judicial economy that are critical to an MDL proceeding. *Executive Software North America, Inc. v. United States District Court*, 24 F.3d 1545, 1557-58 (9th Cir. 1994) (finding a district court must undertake a case-specific analysis to determine whether declining supplemental jurisdiction "comports with the underlying objective of most sensibly accommodating the values of economy, convenience, fairness and comity"). If the claims against Deloitte alone were remanded, Deloitte – as well as the individual defendants and other parties involved in the MDL proceeding (who likely would be witnesses in any state action against Deloitte) – would be subject to disparate discovery and pre-trial rulings occurring on different timelines in multiple fora. Such duplication and wastefulness would vitiate the primary purpose of coordinating discovery and pre-trial proceedings via the MDL mechanism. These claims should remain in this Court along with the claims against the individual defendants.

* * *

In sum, this Court unquestionably has subject matter jurisdiction over Plaintiffs' claims in *Solton* and *Ventura* because those claims "could conceivably have any effect" on WaMu's bankruptcy proceedings. *Feitz*, 852 F.2d at 457. Indeed, the claims are ***already*** manifesting an "effect" on the bankruptcy insofar as WaMu's D&O insurers are advancing defense costs for these claims. The claims against Deloitte satisfy this "conceivable effect" test, too, given the possibility for contribution or indemnity in the event of an adverse judgment, and in any event they fall within this Court's supplemental jurisdiction.

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B. This Court Should Exercise Its Lawful Jurisdiction over Plaintiffs' Claims

As a general rule, "federal courts have a virtually unflagging obligation to exercise the jurisdiction given them." *Ankenbrandt v. Richards*, 504 U.S. 689, 705 (1992) (quotations omitted); *accord First State Insurance Co. v. Callan Associates, Inc.*, 113 F.3d 161, 163 (9th Cir. 1997). Plaintiffs nevertheless ask this Court to decline to exercise its indisputable jurisdiction over *Solton* and *Ventura*, and instead to remand them for piecemeal disposition in California state court. Plaintiffs offer two grounds for this result: "abstention" under Section 1334 of the Judicial Code and "equitable remand" under Section 1452 of the Judicial Code. *See* 28 U.S.C. §§ 1334(c)(1)–(2) & 1452(b). Neither ground has merit.

1. Abstention

Ninth Circuit law forecloses Plaintiffs' abstention argument. In *Security Farms v. International Board of Teamsters*, 124 F.3d 999, 1009 (9th Cir. 1997), the Ninth Circuit squarely held that "[a]bstention can exist only where there is a parallel proceeding in state court. That is, inherent in the concept of abstention is the presence of a pendant state action in favor of which the federal court must, or may, abstain." *Id*. Where, as here, the underlying state proceedings (*i.e.*, the state court lawsuits captioned *Solton* and *Ventura*) were removed to federal court, "[n]o other related proceeding thereafter exists" and there is nothing to which the Court can "abstain" in favor of. *Id*. at 1010; *accord In re Lazar*, 237 F.3d 967, 981–82 (9th Cir. 2001).

Security Farms is dispositive of Plaintiffs' arguments for both "permissive" abstention, 28 U.S.C. § 1334(c)(1), and "mandatory" abstention, *id*. § 1334(c)(2), as courts in this district and throughout the Ninth Circuit have recognized. *E.g.*, *Brown v. Affiliated Computer Services, Inc.*, 2008 WL 2856854, at *1 (W.D. Wash. 2008) ("[R]emoval effectively extinguishes state court jurisdiction and the application of Section 1334(c)(2) unless there exist parallel (pendant) state court proceedings. Accordingly, the notice of removal made the mandatory abstention provision inapplicable to the instant action."); *In re Roman Catholic Bishop of San Diego*, 374 B.R. 756 (S.D. Cal. 2007) ("Debtor's removal of these actions from the state court means there is no longer a parallel state court proceeding," making abstention inapplicable).

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2. Equitable Remand

Plaintiffs next argue that this Court should equitably remand these actions to state court based upon the five elements for mandatory abstention, the elements for discretionary abstention under 28 U.S.C. 1334(c)(1) and a number of other factors, including "(1) effect on bankruptcy estate, (2) extent state law issues predominate, (3) difficulty of state law, (4) comity, (5) remoteness of action to bankruptcy case, (6) right to a jury trial, and (7) prejudice to removed party." Opening Br. at 11. But these factors weigh heavily against equitable remand:

Effect on Efficient Administration of the Bankruptcy Estate: As in other cases where the JPML centralized large numbers of cases related to pending bankruptcies, the very fact of MDL centralization is among the strongest reasons for denying requests to remand individual transferred cases. Judge Cote denied similar requests for equitable remand related to the then-pending WorldCom bankruptcy, stating:

> [I]f this Court were to abstain [and] remand the litigation originally filed in state court, motion practice and discovery would proceed separately in many jurisdictions. The litigation that would ensue in the various fora would be entirely duplicative and wasteful. It would eat into the funds available to pay the alleged victims identified in this litigation. As deep as some of the pockets in this action may be, they are in all likelihood not limitless. A remand would encourage a race for assets, a race that may deprive many victims of the alleged fraud of their fair share of any recovery.

In re WorldCom, Inc. Securities Litigation, 293 B.R. 308, 333–34 (S.D.N.Y. 2003).

Judge Cote's reasoning was endorsed by Judge McKenna in denying a request for abstention or equitable remand of cases related to the Adelphia bankruptcy. *See In re Adelphia Communications Corp. Securities & Derivative Litigation*, 2003 WL 23018802, at *2 (S.D.N.Y. 2003) ("Retaining the cases as a part of the multidistrict litigation will have some beneficial effect on the administration of the Adelphia estate in that retention will permit consolidation (at least for pretrial proceedings) . . . with many other[] [cases] similar in nature."); *see also id.* at *3 (citing *WorldCom*, 293 B.R. at 333–34).

Most recently, Judge Lynch endorsed Judge Cote's reasoning in denying a request to abstain from exercising jurisdiction over a case transferred to him by the MDL Panel and related

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to the Refco bankruptcy. After quoting Judge Cote's statement of her reasoning in the *WorldCom* litigation, Judge Lynch noted: "Given the scores of other Refco-related actions consolidated by the MDL Panel and currently pending before this Court, [plaintiff] has advanced no persuasive reason why a different outcome should result here [than in *WorldCom*]." *In re Refco, Inc. Securities Litigation*, 2008 WL 1827644, at *13 (S.D.N.Y. 2008).

And while the Enron bankruptcy proceeded in the Bankruptcy Court of the Southern District of New York, litigation against Enron-related defendants was centralized by the MDL Panel before Judge Harmon in the Southern District of Texas. In denying a request for abstention under § 1334(c)(1), Judge Harmon reasoned that "[f]or the same reasons that . . . the Multi-District Litigation Panel designated this Court as the site for the Enron multi-district litigation, and to avoid duplicative efforts in the state court and interference with the orderly proceeding of a massive MDL litigation, this Court finds that [abstention should be denied and] the suit should proceed here." *Enron*, 2002 WL 32107216, at *10; *see also Carpenters Pension Trust*, 299 B.R. at 615 ("[G]iven the potential judicial economy of consolidating this action in the MDL court, the Court declines to remand on equitable grounds."). The reasoning of these decisions is fully applicable here, and calls for denial of the Remand Motion.

State Law Issues Do Not Predominate: Each of the complaints in these cases asserts four claims: fraud and deceit, negligent misrepresentation, breach of fiduciary duty and California Corporations Code §§ 25400 and 25403. In addition to three straightforward common-law causes of action, Plaintiffs bring a statutory claim that California courts analyze by following federal precedents construing the nearly identically worded Section 9 of the federal Securities Exchange Act of 1934 (the "Exchange Act"). As noted by a California Court of Appeal: "[California] Corporations Code sections 25400 and 25500 are modeled on subsection (a) and (e) of section 9 of the Securities Exchange Act of 1934 (15 U.S.C. § 78*i*(a) & (e))." *Kamen v. Lindly*, 114 Cal. Rptr. 2d 127, 131 (Cal. App. 6th Dist. 2001). The *Kamen* court continued: "Where, as here, California law is modeled on federal laws, federal decisions interpreting substantially identical statutes are unusually strong persuasive precedent on

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construction of our own laws." *Id.* at 132 (citing *Building Material & Construction Teamsters' Union v. Farrell*, 715 P.2d 648 (Cal. 1986); *Holmes v. McColgan*, 110 P.2d 428 (Cal. 1941)).

Indeed, even in cases that assert *only* state law claims, this factor should be given weight only in proportion to the degree to which any state law claims are difficult. *See, e.g.*, *Abbatiello*, 2007 WL 747804, at *4 ("Although Plaintiffs' Complaint relies on tort, warranty, and products-liability causes of action rooted in state law, these causes of action are not novel or complex and therefore not necessarily best resolved in state court."); *Senorx*, 2007 WL 1520966 at *3; *In re Diversified Contract Services, Inc.*, 167 B.R. 591, 596–97 (Bankr. N.D. Cal. 1994) (case with "causes of action . . . based solely on state law" did not present predominately state law issues).

Plaintiffs' claims do not present difficult questions of California law. Judge Kaplan put it best in his April 22, 2009 Order in *Lehman Brothers* denying a remand motion by these same Plaintiffs based on identical legal arguments: "Plaintiffs here rely principally on a contention that these cases center on an expansive, little interpreted and important statutory scheme. Without intending to denigrate in any way the importance of the California statutes to which they refer, the moving plaintiffs are attempting to have the tail wag the dog." Caplow Decl. Ex. A (Pretrial Order No. 8, *In re Lehman Bros. Securities & ERISA Litigation*). Here, the heart of the matter revolves around allegations of violations of securities laws to be resolved according to federal law, and Plaintiffs' claims will rise or fall on those allegations. Hence, state law does not "predominate" in these cases and this factor weighs against remand.

Any State Law Issues Are Not Difficult: Plaintiffs make no effort to explain why any of the four causes of action present difficult questions of state law that would weigh in favor of equitable remand. Plaintiffs instead devote a large measure of their memorandum of law to a description of what they call the "*unique California statutory scheme*, applicable to cities and counties in California." Opening Br. at 4. This lengthy discussion is a red herring. The so-called "unique California statutory scheme" imposes restrictions on ***Plaintiffs'*** investment decisions. Nowhere do Plaintiffs suggest that the provisions of this scheme can give rise to civil liability on the part of any third party, let alone on the part of defendants in these actions. The

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"unique California scheme" is not relevant to Plaintiffs' state law claims, which focus on "factual questions arising from alleged misrepresentations or omissions concerning WaMu's financial condition with respect to its subprime home loan portfolio," which the JPML has already determined should be heard by this Court. *Washington Mutual*, 536 F. Supp. 2d at 1378.

Comity: Comity considerations do not weigh against the exercise of federal jurisdiction if "the state law claims are straightforward common-law claims that do not involve arcane or idiosyncratic provisions of [state] law" and if "the case was promptly removed" so that "the [state] courts have invested no effort in th[e] case." *Winstar Holdings, LLC v. Blackstone Group L.P.*, 2007 WL 4323003, at *5 (S.D.N.Y. 2007); *Senorx*, 2007 WL 1520966 at *3. Here, not only are there no novel questions of state law, but all of the cases at issue were removed promptly and before any California state court invested any time, resources or effort in the actions. By contrast, this Court has invested significant resources in the WaMu cases.

Remoteness of Action to Bankruptcy Case: As stated in the Notices of Removal for these actions, Plaintiffs' claims may impact and already have impacted the bankruptcy estate by giving rise to, *inter alia*, claims against the WaMu estate for contribution, contractual indemnification and advancement of defense costs, and claims for proceeds of the D&O insurance policies issued by WaMu's insurers. These two cases therefore bear a very close relationship to the WaMu bankruptcy, and this factor therefore weighs against remand.

Other Factors: Nowhere do Plaintiffs mention that they might be deprived of a jury trial or otherwise prejudiced by having their cases heard before this Court. No party is seeking to put these cases before a bankruptcy judge, and Defendants have stated in their Notices of Removal that they do not consent to entry of final orders or judgment by any bankruptcy judge. Hence, these two factors weigh against equitable remand.

IV. CONCLUSION

For the reasons set out above, the Defendants respectfully request that the Court deny Plaintiffs' Motion to Remand.

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CERTIFICATE OF SERVICE

I hereby certify that on September 21, 2009, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via United States first-class mail, postage prepaid, to the non-CM/ECF participants indicated on the Manual Notice List.

DATED this 21st day of September, 2009.

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